an unusually large number of requests for access at the same time, and it would find it impossible to process all of those requests within a matter of days (e.g., the ten or thirty days suggested by the commenters). A number of factors would make it difficult to meet such short deadlines.

The Commission should decline to micro-manage this process. Owners have been providing access to their rights-of-way for a number of years and should be allowed to manage this process free from unnecessary Commission regulation. In the event a carrier believes that its access is being unreasonably delayed, the Commission (or, if applicable, state) complaint procedures should be used to enforce the statutory obligation.

3. The Nondiscriminatory Access Obligation Applies Only to "Poles, Duct, Conduit and Right-of-Way".

Even though the Commission did not ask for comment on the meaning of "pole, duct, conduit or right-of-way" as used in Section 224, certain CAPs and interexchange carriers suggested expanding the list of Owners' property that must be made available pursuant to Section 224(f).[64] The Commission should not expand the list beyond the four items listed in Section 224. These commenters would have the Commission expand this list to include virtually every type of property owned or occupied by an Owner.[65] Obviously, Congress did not intend to expand the list of four items that has been included in the Pole Attachment Act since 1978. Instead, it merely added the access requirement, which is now applicable to these four items. The scope of the requirement should be the plain meaning of these four terms. However, it is not necessary for the Commission to construe the meaning of these terms at this time. Instead, in the event that the parties are unable

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[64]See, e.g., American Communications Services, Inc. at 6-8; AT&T at 14; MCI at 23; Winstar Communications, at 3-6.

[65]MCI at 23.

to negotiate access arrangements for certain communications structures because of their differences of opinion concerning the meaning of these four terms, then the Commission (or, in those states that have certified that they regulate pole attachments, the state regulatory body) could resolve that dispute and provide guidance through an adjudicatory process focused on the structure to which access is sought. The Commission has no authority to expand the list beyond these four items; instead, it may only interpret the four items as applied to the communications structures owned or controlled by the utilities.

Commenters who are attempting to apply Section 224(f) to an expanded list of utility structures are seeking access to a wide variety of locations that do not constitute "pole, duct, conduit or right-of-way." For example, MCI seeks nondiscriminatory access to "any pole attachment, duct, conduit, entrance facilities, equipment room, remote terminal, cable vault, telephone closet, right-of-way or any other pathway that they own or control . . . ."[66] As one can easily observe, MCI has expanded the list of items to which Section 224(f) properly applies to include seven additional items. Using a slightly different approach, AT&T attempts to read a number of items into the meaning of "right-of-way."[67] However, the proper meaning of "right-of-way" in this list is "a legal right of passage over another person's ground."[68] Under this definition of right-of-way which reflects its plain meaning, AT&T and MCI could not add any of their items to the list via an interpretation of

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[66]MCI at 23.

[67]AT&T at 14-15.

[68]Webster's New Collegiate Dictionary at 990. Cf. Black's Law Dictionary at 1191 (5th Ed. 1979) ("a right belonging to a party to pass over land of another"). See also 25 Am. Jur. 2d Easements and Licenses §7, at 576 (1996)("[A] right-of-way is the right belonging to a party to pass over the land of another and is considered to be an easement.")(citing Ryder v. Petrea, 416 S.E.2d 686 (Va. 1992).

"right-of-way."[69] Besides, the Commission's rulings under the Pole Attachment Act have not sought to apply it to anything other than poles and conduit, and in fact, most of the Commission precedent has involved only poles -- due to the fact that they are "the preponderant medium for CATV attachments."[70] The Commission should not attempt to expand the four items by construing right-of-way, if at all, to include anything other than its plain meaning, that is, the rights a person possesses to pass over the surface of the land of another person.

4. Additional Onerous And Unnecessary Regulations

The interexchange carriers go beyond merely responding to the Commission's questions concerning regulations it should adopt under Section 224 and suggest other onerous, detailed regulations that are completely unnecessary. The subjects of most of these requests should be addressed, if at all, in the negotiations of the pole attachment agreements. For example, AT&T suggests a rule requiring Owners to provide "cable plats and conduit prints." These drawings are confidential and competitively sensitive. It would be anticompetitive for the Commission to require LECs to disclose detailed drawings of their outside plant structures, both existing and planned. Disclosure of such information would provide an unfair competitive advantage to the applicant carrier, which would be able to misuse the proprietary information to its competitive advantage. For example, the applicant could use the plans to find any weakness in the LEC's outside plant network

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[69]Some of the items that AT&T and MCI seek to add to the list are the subjects of a pending rulemaking, Telecommunications Services Inside Wiring, CS Docket No. 95-184, Notice of Proposed Rulemaking, released January 26, 1996, ¶¶ 61-64. For example, access to the "entrance facilities, telephone closets or equipment rooms" in buildings, described in AT&T's Comments, is one of the subjects of that proceeding.

[70]Adoption of Rules For the Regulation of Cable Television Pole Attachments, 72 F.C.C. 2d 59, 62 n. 4 (1979).

design, areas where expansion is planned and other detailed business plans, which should not be shared between competitors. In addition, disclosure of such valuable drawings would provide unfair strategic assistance to a competitor in designing its network. These drawings are constantly being updated with the latest, most sensitive, information concerning the LECs outside plant. In SWBT's case, these drawings contain information concerning other users' use of its rights-of-way which may be proprietary to those users. Those seeking access to SWBT's right-of-way structures do not need to have these drawings because SWBT's procedures require SWBT personnel to research the route to be used by the applicant. Given the other available alternative methods, the Commission should not require disclosure of confidential, competitively sensitive network plans. The Commission should reject this proposed regulation as well as all of the other regulations suggested on unnecessary, extraneous, or arcane subjects.[71]

C. The Commission should reject suggestions to use compensation standards other than Section 224's existing fully allocated cost formula.

Several commenters suggest using a compensation standard other than one that approximates fully allocated costs. The Commission's pole attachment formula is intended to approximate the fully allocated costs incurred by the Owner. The suggestions to use any different compensation standards should be rejected, as they are inconsistent with Section 224 and the Commission's pole attachment rules. Nothing in the Act requires a reduction in the rate charged pursuant to the Commission's existing formula. For example, MCI suggests using "long-run incremental costs."[72]

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[71]See, e.g., American Communications Services, Inc. at 8 (right-of-way reports); GST Telecom at 6-7 (licensee should not pay for overtime unless expressly authorized) MFS at n. 9 (utility requiring licensee to overlash cables); Winstar Communications, Inc. at 2-5 (access to rooftop space on LECs' buildings for 38 Ghz microwave radio airlines).

[72]MCI at 23-24.

Similarly, GST Telecom suggests that only "incremental costs should be recovered by the utility."[73] These and other commentor's similar suggestions are inconsistent with Section 224 and the Commission's previous rulings under Section 224.[74] Also, the Commission should defer action on any rate-related issues, such as suggestions concerning make-ready charges,[75] to a separate proceeding concerning the rate-related provisions of Section 224.[76]

D. The burden of proof should be the same as in any other pole attachment complaint proceeding.

Several of the CAPs and interexchange carriers recommend that the Owner have the burden of proving that any denial of access was justified. This allocation of the burden of proof would be inconsistent with the normal burden of proof in pole attachment complaint proceedings. The complainant generally has the burden of proof in pole attachment complaint proceedings. Thus, in the past, if a cable operator complained that a rate, term or condition was not just and reasonable, the cable operator had the burden of establishing a prima facie case. The same should be true in the case of the terms and conditions of access. In placing the burden of proof on the complainant under the pole attachment rules, the Commission noted that "[a]s a general proposition, the burden of proof in any action rests on the party going forward with an issue."[77] The same general rule should be applied here given that this is merely another term or condition of pole attachments. None of the

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[73]GST Telecom at 6.

[74]Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, CC Docket No. 86-212, 2 FCC Rcd 4387 (1987).

[75]See, e.g., Continental Cablevision et al. at 13-14, 19-20.

[76]BellSouth at 18.

[77]Adoption of Rules For the Regulation Of Cable Television Pole Attachments, 68 F.C.C. 2d 1585, 1598 ¶40 (1978).

commenters that urged the Commission to place the burden of proof on the Owner provide any reason for distinguishing denial of access from any other term or condition for purposes of a pole attachment complaint.

E. LECs are required only to provide "nondiscriminatory access", not unconditional access.

Section 224(f) draws a distinction between electric utilities and all other Owners. Paragraph (f)(1) requires all Owners to allow nondiscriminatory access to their rights-of-way. Paragraph (f)(2) then further limits that obligation with respect to electric utilities by allowing them to deny access on a nondiscriminatory basis. However, these provisions cannot reasonably be construed to require all utilities other than those providing electric service to provide unconditional access to their rights-of-way, as suggested by a few commenters.[78] Simply stated, the statute says "nondiscriminatory access" not "unconditional access." The distinction between electric utilities and all other utilities reflected in paragraphs (f)(1) and (f)(2) is that, in contrast to all other utilities (including telephone, gas, water, steam or other public utilities that own rights-of-way), electric utilities are more clearly allowed to deny access so long as they do so on a nondiscriminatory basis. There are a number of good reasons for concluding that "nondiscriminatory access" does not mean unconditional access to all available capacity. First, the statute does not require LECs to construct right-of-way facilities for their competitors. If competitors' demands could immediately exhaust all available capacity, LECs would be required to construct additional right-of-way facilities for purposes of providing their own services. Second, if Congress had intended to deny Owners the right to reserve space for their own use or if it had intended that LECs construct their competitor's right-of-way facilities, then

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[78] AT&T at 16-17; Citizens Utilities at 3; General Communication, Inc. at 3; MCI at 21; National Cable Television Association, at 3-5.

it could have stated so expressly in revising Section 224. Third, Congress did not express any intention of elevating the rights of right-of-way users and their customers so as to preempt the interests of the LECs' customers. Fourth, even in the context of central office physical collocation, the Commission recognized that a LEC's ability to serve its customers must take precedence over providing others with access to the LEC's facilities. The Commission explained as follows:

> We find that requiring LECs to expand their facilities or relinquish space reserved for their future use, as suggested by some parties, is neither reasonable nor likely to serve the public interest. Such a requirement could interfere with the LECs' ability to serve existing ratepayers and might impose considerable and unnecessary expense on the LEC when a virtual collocation alternative can be implemented.[79]

In denying access for purposes of continuing to provide reliable and adequate facilities for their own customers, LEC would not be violating the principle of "nondiscriminatory access" because all applicants would be subject to the same terms and conditions of access on a nondiscriminatory basis. Some commenters do, in fact, acknowledge that all Owners must be able to set aside some capacity for foreseeable future use. For example, AT&T indicates that the obligation to provide access only exists "if the utility has spare capacity available." However, AT&T's definition of "spare capacity" only includes that which is in excess of current use and capacity "set aside for immediately foreseeable future use -- for example, within one year or less."[80] There is no basis for AT&T's narrow view of what LECs need to be able to do to set aside capacity for foreseeable expansion of facilities. In the context of central office collocation, the Commission held that a ten-year period

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[79]Order, CC Docket No. 93-162, 7 FCC Rcd at 7408 ¶79.

[80]AT&T at 16.

was too long, but a five-year period was reasonable.[81] There is no reason for the Commission to reach a dissimilar conclusion concerning right-of-way than it reached in the central office collocation decisions. Expansion is expansion, whether it is a central office or a right-of-way. Several commenters explain the compelling reasons why Owners must be allowed to reserve space to satisfy present and future obligations to serve customers.[82]

While a few commenters take the radical position that only Owners that provide electric service can deny access on the basis of insufficient capacity or for "safety, reliability, and generally applicable engineering purposes," other interexchange carriers and CAPs recognize that LECs also must comply with safety, reliability and engineering standards in their provision of access to right-of-way.[83] For example, Sprint describes certain engineering and safety factors that an Owner must consider in providing access:

> For example, in general, one duct or conduit needs to remain available so that in emergency situations, such as a cable cut, the traffic can be rerouted to the spare facility. Pole attachment capacity is limited by height, weight, and geographic considerations. And interconnectors . . . should be subject to the same OSHA and safety procedures which ILEC employees are required to follow . . ..[84]

These examples of engineering and safety constraints demonstrate that the vast majority of them are equally applicable to electric utilities and LECs. A LEC cannot ignore safety requirements such

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[81]Expanded Interconnection With Local Telephone Company Facilities; Petitions For Exemption From Physical Collocation Requirement, CC Docket No. 91-141, 8 FCC Rcd 4569, 4572 ¶16 (1993). See, also, Expanded Interconnection With Local Telephone Company Facilities, 9 FCC Rcd 5154, 5174-76 ¶¶67-72 (1994).

[82]See, e.g., Pacific Telesis Group at 20.

[83]Sprint Corp. at 17; MFS Communications Company, Inc. at 11.

[84]Sprint Corp. at 17.

as those in the National Electric Safety Code any more than an electric utility could. Therefore, to construe Section 224(f) as commenters such as AT&T would construe it, would be illogical, hazardous to safety and a threat to the LEC's service to its own customers.

F. LEC/Electric utility joint use agreements are not displaced by Section 224.

One commenter expresses concern regarding the viability of reciprocal joint use agreements between LECs and electric utilities, and suggests that such joint use agreements "must be allowed to remain in place under"[85] any Commission rules adopted in this proceeding. Aside from the persuasive reasons cited by this commenter, Section 224 would not apply at all to a LEC's provision of pole attachment space to an electric utility for electric utility purposes. Also, it would not apply to pole attachment space furnished to an electric utility unless the electric utility became a "telecommunications carrier" as defined in Section 224(a)(5). Likewise, Section 224 would not apply to an electric utility's provision of pole attachment space to an incumbent LEC, in the area in which it is the incumbent, because the same definition of "telecommunications carrier" excludes incumbent LECs. Therefore, the electric utilities' concerns regarding such joint use agreements will not materialize as a potential issue until an electric utility which is a party to a joint use agreement begins providing telecommunications services in the same geographic area that is the subject of the joint use agreement. If that occurs, electric power attachments and the incumbent LEC's attachments would not be affected. Also, to the extent the electric utility's attachments are used to provide telecommunications services, the Commission should allow such joint use agreements to continue, as suggested by the electric utility commenter, especially where the joint use agreement

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[85] American Electric Power Service Corp. et al. at 16. See also BellSouth at 16.

pre-dates the Act. Contrary to the position of one commenter,[86] the Act expresses an intention to defer to privately negotiated agreements and expressly preserves pole attachment agreements entered into prior to the Act. The following parenthetical in Section 224(d)(3) indicates Congress' intention of preserving pole attachment agreements predating the Act: "(to the extent such carrier is not a party to a pole attachment agreement)." Rather than establishing any rules concerning joint use agreements at this time, the Commission should defer any ruling concerning joint use agreements until it is necessary for the Commission to intervene to facilitate resolution of a specific case.

G. The Commission should not adopt any notification rules that would unreasonably delay or impede an Owner's right-of-way construction work.

The interexchange carriers and CAPs commenting on this issue recommend a number of onerous rules to regulate right-of-way construction activity. These proposed rules are incompatible with the deregulatory nature of the Act and would involve the Commission in detailed administration of right-of-way construction activity. Some of these commenters recommend rules that would not permit an Owner to begin right-of-way construction work until the expiration of a lengthy notification period. The notification periods recommended by these commenters are extremely long, as follows: Teleport (twelve months), GCI (six months), MFS (ninety days), and AT&T (sixty days). Lengthy notification periods are not necessary to achieve the statutory purpose of giving the user "a reasonable opportunity to add to or modify its existing attachment." These lengthy notification periods would unnecessarily delay and impede an Owner's ability to repair, maintain, expand, replace or perform other work required to be done on rights-of-way. SBC concurs with the comments of Ameritech, GTE and the Utilities Telecommunications Council which describe the

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[86] American Communication Services, Inc. at 7 & 9. See also NEXTLINK at 6-7.

complexity of right-of-way construction activity hamstrung by detailed notification requirements. Instead of adopting detailed rules governing when and how Owners must provide this notification, the Commission should allow Owners to implement reasonable procedures consistent with each of their own operations for providing reasonable advance notice of such modifications.[87]

An inflexible notification rule would lead to extremely inefficient right-of-way construction. For example, if an Owner determines that modification is necessary along a particular route and work could begin within a matter of days; instead, the Owner would be forced to wait until the expiration of a lengthy notification period, such as sixty or ninety days, before work could begin. Even a shorter notification period would be problematic for minor modifications or modifications required to maintain reliable service.

Aside from the harm to the Owner's rateayers resulting from delays in right-of-way construction, an inflexible notification rule also would be detrimental to licensees, whose attachments or modifications would be delayed until after the notification to other licensees. For example, a new licensee's request to attach to a group of poles would trigger notification to other licensees if pole modifications are required; and, under the rule sought by the CAPs and interexchange carriers, the construction work necessary to install the new licensee's attachments could not begin until the expiration of the lengthy notification period that the CAPs and interexchange carriers seek to impose. The following hypothetical situation will help illustrate a secondary adverse impact of a lengthy notification period:

> Carrier A and Carrier B are third party licensees on a poles in a commercial district and both are competing for a long-term high-capacity service offering to a potential customer. The customer

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[87]Ameritech at 38-39; GTE at 27-28; UTC/Edison Electric Institute at 13-14.

> requires service to be installed in thirty (30) days or less. While Carrier A can provide service without requiring modifications to any of the utility's poles, Carrier B must place some new facilities on certain poles in the area. Carrier B's request to attach would trigger notification to other licensees, possibly including the competing bidder, Carrier A. An inflexible, long notification period -- if one is imposed by the Commission -- may cause Carrier B to lose the contract to Carrier A. Assuming the two carriers' prices are comparable, the built-in delay caused by a lengthy federally mandated notification period may be the sole or primary cause of Carrier B's loss.

Assuming *arguendo* the Commission decides it must adopt a minimum notification period, SBC would recommend that the Commission limit the applicability of the notification requirement to those circumstances when users would actually benefit from the notification, as determined by the Owner's reasonable, nondiscriminatory practices. For example, replacement of isolated poles would only rarely offer any opportunity to increase capacity in a lead of poles; while replacement of a majority of the poles in a lead might do so. Likewise, a notification would not serve Section 224(h)'s purposes at all when an Owner is merely performing minor repair work on a group of poles.

Some commenters, such as AT&T, suggest further detail in the regulations under Section 224(h). SWBT opposes adoption of any such detailed regulations . In particular, SWBT is opposed to the distinction drawn in AT&T's comments between modifications to the right-of-way versus modifications to an attachment. The statute, by its own terms, only applies when the Owner plans to modify or alter the right-of-way; it does not apply when the Owner merely modifies its own attachment.[88]

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[88]SWBT also objects to the implication of AT&T's comments that it would be entitled to reserve space in the modified right-of-way for subsequent use. Owners must be able to adopt reasonable "anti-warehousing" requirements in their pole attachment agreements to discourage hoarding of right-of-way capacity to the detriment of the Owner and other potential users. See

(continued...)

V. CONCLUSION

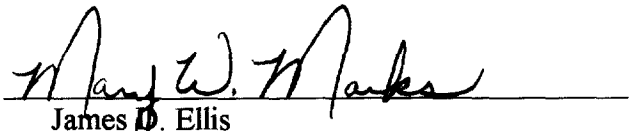
Most of the Comments filed in this docket urge Commission action that will, consistent with the Act, promote competition and reduce regulation. The commenters were in general agreement concerning the major issues related to dialing parity. Most commenters supported the Commission's tentative conclusions concerning number administration, agreeing that the *NANP Order* satisfies the Act's requirements and urging expeditious organization of the North American Numbering Council and appointment of the new North American Numbering Plan Administrator. Most commenters also agreed that the current industry process for notification of technical changes is working well and does not require the Commission to promulgate additional regulations. Finally, all commenters that are owners of rights-of-way agreed that the Commission should minimize federal regulations concerning nondiscriminatory access to such rights-of-way. Since owners of rights-of-way and licensees can resolve most access issues through negotiated agreements, federal or state regulatory intervention is necessary only in areas of disagreement.

(...continued)
Special Access Physical Collocation Designation Order, CC Docket No. 93-162, 8 FCC Rcd 6909, 6919-20 ¶¶ 42-44 (1993).

In this docket, the Commission has tremendous opportunities to encourage the increasingly competitive telecommunications marketplace to operate freely, efficiently, and effectively. SBC urges the Commission to avail itself of those opportunities to the fullest extent, consistent with the mandate of Congress as expressed in the Act.

Respectfully submitted,

SBC COMMUNICATIONS INC.

By: 

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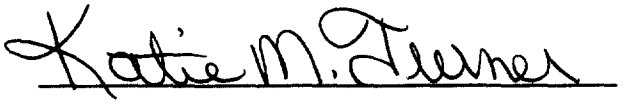
CERTIFICATE OF SERVICE

I, Katie M. Turner, hereby certify that the foregoing, "Reply Comments of SBC Communications Inc. Relating to Dialing Parity, Number Administration, Notice of Technical Changes, and Access to Rights of Way" in Docket No. 96-98, has been filed this 3rd day of June, 1996 to the Parties of Record.



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